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No. 84-320

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

NATIONAL FARMERS UNION INSURANCE COMPANY,
Petitioner,

versus

CROW TRIBE OF INDIANS, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF OF AMICI CURIAE SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT AND ARIZONA PUBLIC SERVICE COMPANY IN SUPPORT OF THE PETITIONER

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MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF

The Salt River Project Agricultural Improvement and Power District and Arizona Public Service Company hereby move for leave to file a brief of amici curiae in support of the Petitioner in this case. The proposed brief accompanies this motion. The amici sought and obtained the consent of the Petitioner, National Farmers Union Insurance Company, and the Respondent Crow Tribe of Indians. However, counsel for the Respondents "Sage and Not Afraid" has withheld his consent.

The amici are interested in this case because they own and operate power plants on the Navajo Indian Reservation and have for many years resisted the attempts by the Navajo Tribe to exercise civil jurisdiction over them. For a more detailed statement, see the following brief at page 1. The amici believe that this case is directly controlled by Article III of the Constitution and this Court's decision in *Martin v. Hunter's Lessee*, 1 Wheat. 304, 4 L.Ed. 97 (1816). Since we have seen no evidence that this case played any role in the decision below, it will be important for this Court to have the benefit of our argument to ensure that the constitutional principle involved is not ignored.

Respectfully submitted,

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BRIEF OF AMICI CURIAE SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT AND ARIZONA PUBLIC SERVICE COMPANY IN SUPPORT OF THE PETITIONER

INTERESTS OF THE AMICI CURIAE AND INTRODUCTION

The amicus curiae Salt River Project Agricultural Improvement and Power District, a political subdivision of the State of Arizona, is the operating agent of the Navajo Project, a coal-fired electric generating plant and attendant facilities, located on the Navajo Indian Reservation in Arizona. The Navajo Project is co-owned by the amicus, the City of Los Angeles, Arizona Public Service Company, Nevada Power Company, and Tucson Electric Power Com-

pany. Salt River Project Agricultural Improvement and Power District holds title to 24.3 percent of the Navajo Project for the use and benefit of the United States intended for use by the Department of the Interior to meet its power needs for the Central Arizona Project.

Amicus Arizona Public Service Company is the project manager of the Four Corners Generating Station, a coal-fired electric generating facility owned by Arizona Public Service Company, Tucson Electric Power Company, Public Service Company of New Mexico, Southern California Edison Company, El Paso Electric Company, and Salt River Project Agricultural Improvement and Power District. The Four Corners Generating Station is located on the Navajo Indian Reservation in New Mexico.

The amici and their on-reservation fuel suppliers, Peabody Coal Company and Utah International, have for many years disputed the right of the Navajo Tribe to tax and otherwise exercise civil jurisdiction over them. See, e.g., the briefs filed by amici in this Court in *Kerr-McGee Corporation vs. Navajo Tribe of Indians,* No. 84-68.

These electric generating plants represent capital investments in excess of $1 billion on the reservation. The amici can be directly affected by the outcome in this case and have a direct interest in protecting their investment and their operations from the exercise of unlawful tribal civil jurisdiction. This end cannot be achieved unless there is federal judicial review of federal questions decided by tribal courts.

The amici urge this Court to reverse the judgment of the Court of Appeals because it is in conflict with Article III of the United States Constitution and this Court's decision in *Martin v. Hunter's Lessee,* 1 Wheat. 304, 4 L.Ed. 97 (1816).

SUMMARY OF ARGUMENT

Wholly apart from its ultimate resolution on the merits, a claim that a tribal court has no jurisdiction over claims made against non-Indians raises a federal question under

this Court's federal common law relating to Indians. *Montana v. United States,* 450 U.S. 544, 565 (1981); *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191 (1978). The District Court had subject matter jurisdiction to entertain the claim under 28 U.S.C. § 1331, because "laws" within the meaning of Section 1331(a) embrace claims founded on federal common law. *Illinois v. City of Milwaukee,* 406 U.S. 91, 99-101 (1972).

There must be a federal forum somewhere within which to raise federal questions. Article III of the United States Constitution declares that the judicial power of the United States shall extend to all cases arising under the Constitution and laws of the United States. This case is directly controlled by *Martin v. Hunter's Lessee,* 1 Wheat. 304, 4 L.Ed. 97 (1816). The language of Article III is mandatory upon the Congress and Congress could not, without violating its duty under Article III, deny federal claimants a federal forum. *Id.* at 328. The whole judicial power of the United States must be at all times vested either in an original or appellate form in some federal court. *Id.* at 331.

Congress has not vested this Court with appellate jurisdiction over final judgments of tribal courts. Therefore, the District Court must have jurisdiction to entertain National's federal claims or else the judicial power of the United States would not be vested under *Martin v. Hunter's Lessee.*

ARGUMENT

Tribal courts either have jurisdiction over claims against non-Indians or they do not. If they do, it is because federal law permits it. If they do not, it is because federal law prohibits it. If tribal courts do not have jurisdiction over non-Indian defendants, then the United States district courts must have jurisdiction to entertain *federal* claims to be immune from tribal court jurisdiction. If tribal courts do have jurisdiction over non-Indians, then the district courts or this Court must have jurisdiction to review federal questions decided by tribal courts. We discuss' both possibilities and

show that regardless of the outcome, the Court of Appeals must be reversed.

I.

IF FEDERAL LAW PROHIBITS THE EXERCISE OF JURISDICTION BY A TRIBAL COURT OVER A NON-INDIAN DEFENDANT, A FEDERAL FORUM MUST EXIST TO ENFORCE THE FEDERAL PROHIBITION.

We agree with the District Court that a tribal court has no jurisdiction over claims made against non-Indians. In *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191, 211 (1978), this Court held that Indian tribal courts did not have criminal jurisdiction over non-Indian defendants because "from the formation of the Union and the adoption of the Bill of Rights, the United States has manifested an equally great solicitude that its citizens be protected by the United States from unwarranted intrusions on their personal liberty." In *Montana v. United States,* 450 U.S. 544, 565 (1981), this Court stated that "[t]hough *Oliphant* only determined inherent tribal authority in criminal matters, the principles on which it relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of non-members of the Tribe." This makes sense because the intrusion on personal liberties of Americans is the same whether a defendant in a criminal or a civil case.

Ever since *Talton v. Mayes,* 163 U.S. 376 (1896), this Court has held that the limitations imposed upon the United States by the Bill of Rights and on the states by the Fourteenth Amendment do not operate to limit the exercise of tribal governmental power over its own members. Nor does federal or state jurisdiction exist to entertain claims brought by Indians under the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303. *Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978). Unconstrained tribal court jurisdiction over non-Indian defendants collides with non-members' expectations of the sanctity of civil liberties under our constitutional

scheme. Just as *Williams v. Lee,* 358 U.S. 217 (1959) requires suits against Indians to be brought in tribal court, *Oliphant* and *Montana* require suits against non-Indians to be brought in state or federal court. Defendants in either case would then be subject to the jurisdiction of the courts associated with the government to which they have consented to be governed.

It is true that this Court need not decide the question of tribal court jurisdiction over non-Indian defendants in this case. But what is clear from our argument against tribal court jurisdiction over non-Indian defendants is that this claim arises under federal law. The right of non-Indian defendants to be immune from tribal court jurisdiction rises or falls on the federal common law of Indian relations. The United States district courts have jurisdiction to entertain claims arising under federal law under 28 U.S.C. § 1331, including claims based upon federal common law. *Illinois v. City of Milwaukee,* 406 U.S. 91, 99-101 (1972).

The claim of a non-Indian to be immune from tribal court jurisdiction does not arise under the Indian Civil Rights Act, and therefore the rule announced in *Santa Clara Pueblo v. Martinez, supra,* is no bar to National's claim. Indeed, Congress is without power to deprive a federal claimant his right to a federal forum somewhere in the federal system. The Court of Appeals did not reach the merits of the jurisdictional challenge but was content to deny National an opportunity to present its federal claim to a federal forum even if the tribal court was without jurisdiction. In doing so, the Court of Appeals ignored a most fundamental principle of our constitutional scheme. Ever since *Martin v. Hunter's Lessee,* 1 Wheat. 304, 4 L.Ed. 97 (1816), it has been clear that there must be a federal forum somewhere within which to raise federal questions. There, this Court held that it had jurisdiction to review the judgments of state courts because Article III of the Constitution requires that the judicial power of the United States must be at all times vested either in an original or appellate form in some federal court.

As Justice Rehnquist noted in his opinion accompanying his stay order in this very case, 53 U.S.L.W. 3167 (Rehnquist, Circuit Justice, Sep. 10, 1984), this Court has jurisdiction to review on appeal or certiorari federal questions decided by state and federal courts. Nowhere has the Congress accorded this Court jurisdiction to review final decisions of tribal courts. If that be the case, then the district courts must have jurisdiction to entertain claims brought by non-Indians based upon federal law or else the entire judicial power of the United States under Article III of the Constitution would not be vested. Under Article III, federal judicial power shall extend to all cases arising under the laws of the United States. It does not state that it shall extend to some cases. As this Court stated in *Martin v. Hunter's Lessee*, the language of Article III is mandatory on the Congress, and Congress could not, without violating its duty, deny federal claimants a federal forum. 1 Wheat. at 328. [1]

The claim of National below rested on federal common law which in a very real sense has its basis in the Constitution itself. The Tenth Amendment to the Constitution declares that the powers not delegated to the United States by the Constitution nor prohibited by it to the states are reserved to the states respectively, or to the people. Thus, the federal Constitution guarantees to non-Indians the right to be free of tribal court jurisdiction over them. The Tenth Amendment describes the universe of sovereign powers over non-Indian Americans within the boundaries of the United States. Article III of the Constitution extends federal judicial power to all cases arising under the Constitution and the laws of the United States. National's case is such a claim to which Article III judicial power must be vested at some stage in the federal system. 1 Wheat. at 329.

[1] This Court acknowledged that in the universe of courts, federal claims under Article III could only occur in state or federal courts. 1 Wheat. at 340 ("which cases could exist in no other courts").

It is clear, therefore, that if National's claim to immunity from tribal court jurisdiction based upon federal common law and the Constitution is correct, then the judicial power of the United States under Article III of the Constitution attached to National's claim and it was error for the Court of Appeals to order its complaint dismissed. We next show that even if National's claim to be immune from tribal court jurisdiction was incorrect, the Court of Appeals still erred in dismissing its complaint.

II.

CONGRESS COULD NOT PROVIDE FOR TRIBAL COURT JURISDICTION OVER NON-INDIAN DEFENDANTS UNLESS IT, AT THE SAME TIME, ENLARGED THE APPELLATE JURISDICTION OF THE SUPREME COURT TO REVIEW FEDERAL QUESTIONS.

Unlike the District Court, the Court of Appeals did not reach the merits of National's jurisdictional challenge. Had it done so, and reached the same conclusion reached by the District Court, it would have erred in dismissing the complaint for the reasons stated above. On the other hand, if the Court of Appeals reached the question of tribal court jurisdiction over non-Indians, and concluded that such jurisdiction existed, it still would have been error to dismiss the complaint. This is so because National's claim that tribal courts have no jurisdiction over non-Indians is a *federal* claim. If a tribal court, in the exercise of its jurisdiction, reaches and decides a federal question, there is no federal judicial review of that judgment. The Congress has not enlarged the appellate jurisdiction of the Supreme Court to freely review federal questions decided by tribal courts. [2]

[2] Indeed, the failure of Congress to enlarge the appellate jurisdiction of this Court to include review of federal questions decided by tribal courts is powerful evidence that Congress understands tribal courts to be without jurisdiction over claims brought against non-Indians.

Nor has the Congress granted to the district courts appellate jurisdiction over judgments rendered by tribal courts. But Article III of the Constitution extends the judicial power of the United States to all cases arising under federal law. Congress cannot permit tribal courts to decide federal questions without at the same time providing for federal judicial review of those judgments at some stage of the federal system. *Martin v. Hunter's Lessee, supra,* 1 Wheat. at 328.

Under *Ashwander v. Tennessee Valley Authority,* 297 U.S. 288 (1936), the Court of Appeals was bound to avoid passing upon a constitutional question if it could do so. The Court of Appeals could not have upheld tribal court jurisdiction over non-Indians asserting federal claims without at the same time concluding that the Congress unconstitutionally failed to provide for federal judicial review of tribal court judgments deciding federal questions. Thus, even had the Court of Appeals been persuaded that tribal court jurisdiction existed, the presence of a federal question and the nonexistence of federal judicial review should have persuaded the Court of Appeals that no such tribal court jurisdiction existed in the case before it and, thus, the judgment of the district court should have been affirmed.

The merits of tribal court jurisdiction seem to us to be inextricably intertwined with "the more fundamental question of whether there is any federal court review available to non-Indians for excesses of Tribal Court jurisdiction." *National Farmers Union Insurance Companies v. Crow Tribe of Indians,* 53 U.S.L.W. at 3168 (Rehnquist, Circuit Justice, Sep. 10, 1984). There can be no tribal court jurisdiction over non-Indian defendants pressing federal claims because there is no appellate jurisdiction in this Court to review federal questions decided by tribal courts. And because there is no appellate jurisdiction in this Court to review federal questions decided by tribal courts, there must be jurisdiction in the District Court to entertain National's claim. *Martin v. Hunter's Lessee, supra,* 1 Wheat. 304, 4 L.Ed. 97 (1816).

CONCLUSION

Congress has not vested this court with appellate jurisdiction over final judgments of tribal courts deciding federal questions. Unless this Court is willing to characterize this omission in its appellate jurisdiction as unconstitutional under Article III, tribal courts cannot have jurisdiction over non-Indian defendants asserting federal questions and, therefore, the District Court must have jurisdiction under Article III to hear and determine National's claim. *Martin v. Hunter's Lessee, supra.* The judgment of the United States Court of Appeals for the Ninth Circuit must be reversed.

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